

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MARCUS EUGENE SHAW,

Appellant.

No. 37686-5-II

UNPUBLISHED OPINION

Houghton, J. — Marcus Shaw appeals his convictions of unlawful delivery of a controlled substance and unlawful possession of a controlled substance. He argues that the trial court erred when it admitted an improperly authenticated piece of evidence, that admission of the evidence denied him his confrontation rights, and that his counsel rendered ineffective assistance by failing to object adequately to the lack of foundation for the evidence. We affirm.

**FACTS**

On September 25, 2007, the Tacoma police conducted an undercover “buy-bust” drug investigation in Wright Park using a confidential informant (CI) wired with an audio recording device.<sup>1</sup> 3 Report of Proceedings (RP) at 141. While the CI conducted the operation in the park,

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<sup>1</sup> In a “buy-bust” operation, police cooperate with a CI who purchases drugs from a suspect using currency with known serial numbers. 3 Report of Proceedings at 141. The police search the CI before and after each drug buy to ensure he or she possesses no outside contraband or currency. The police then use this evidence to prosecute the suspect.

the police sat in an unmarked vehicle nearby and video recorded the CI's movements.

Later that afternoon, the CI contacted Shaw. The police covertly followed Shaw and the CI as they walked to the front of an apartment building near the park. After a few minutes, a red Ford Explorer approached, Shaw stepped inside, and the vehicle left the area. Approximately five minutes later, the vehicle returned to the same place, Shaw stepped out, spoke with the CI, and dropped several small objects in the CI's hand. The CI then walked over to the police and surrendered crack cocaine.

The police arrested Shaw on the street and later discovered cocaine on his person. They followed and arrested the driver of the red vehicle and found the CI's drug-buy money in the center console.

At trial, the court admitted a redacted video and audio recording of the transaction between Shaw and the CI. The admitted version<sup>2</sup> of the recording included the "verbal acts between the CI and Mr. Shaw of doing the drug deal" and suppressed as hearsay and confrontation violations all CI statements that amounted to an attempt "to manufacture evidence for the police." 5 RP at 415, 416.

Outside the presence of the jury, Shaw's counsel agreed that the redacted version of the recording complied with the trial court's order and that the State had removed the CI's testimonial statements. Officer McColeman authenticated the original recordings and Detective Yenne authenticated the redacted version. When the State offered the redacted recording into evidence, Shaw's counsel objected based on lack of foundation, and the trial court overruled the

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<sup>2</sup> The trial court partially redacted the audio but admitted the video in its entirety because the events occurred in a public area.

objection.

The jury convicted Shaw of unlawful delivery of a controlled substance and the lesser included offense of unlawful possession of a controlled substance. He appeals.

## ANALYSIS

### Admission of the Recording

Shaw first contends the trial court admitted an improperly authenticated recording of the transaction. He asserts that the trial court should not have allowed the CI's statements into evidence and that no witness authenticated Shaw's voice on the recording.

We review the trial court's admission of evidence for abuse of discretion and overturn rulings based on untenable grounds or untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Evidence sufficient to support basic findings of identification and authentication can authenticate a recording. *State v. Jackson*, 113 Wn. App. 762, 769, 54 P.3d 739 (2002). These two requirements establish that the item is what the proponent claims it to be and that the item is in substantially the same condition as it was at the time of the crime. *Jackson*, 113 Wn. App. at 765-66.

Shaw's first argument misstates the trial court's ruling. The trial court did not rule that all the CI's statements were per se inadmissible as testimonial under *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Instead, it explained, "with regard to the statements of the CI, those cannot come in because I believe those are statements that form a problem under *Crawford*." 2 RP at 89. By "statements of the CI," the trial court meant the unprompted statements the CI made into the recording device before the transaction. 2 RP at 89.

Reading the entire record, including a lengthy colloquy where the trial court explained its ruling to the State, its intent is clear,

Do you want to know what my order is or are you continuing to argue? I'm at this point starting to get frustrated. I allowed the CI's statements to Mr. Shaw as a verbal act that was not hearsay, to be allowed in. Look at the rules of evidence. I'm really getting frustrated here. I've said it several different ways. I don't understand why you're having this difficulty. So [the CI's] statements with Mr. Shaw that are the verbal acts of the deal, 'How much is it?' 'I have 20,' those types of things, that's allowed because that's not hearsay. Everything else that [the CI is] doing to try to manufacture evidence for the police is hearsay.

5 RP at 415-16.

The record likewise does not support Shaw's second assertion that no one testified to the voices' authenticity or identity in the recording. McColeman and Yenne authenticated the recording. McColeman testified the source of the video shown at trial was the original recording. Yenne testified that he heard the transaction as it occurred, that he had visual contact with the CI, that he recognized Shaw from that day, and that Shaw was present in the courtroom. Shaw fails to show the trial court abused its discretion.

Shaw further contends the admission of the recording denied him his right to confront witnesses against him under the Sixth Amendment. He argues that the CI's statements were testimonial under *Crawford* because the CI asked for narcotics from Shaw.

*Crawford* lists various formulations of testimonial statements and sets them apart from traditional hearsay, which is an out of court statement offered to prove the truth of the matter asserted. 541 U.S. at 51-53; *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); ER 801. Testimonial statements offered for purposes other than establishing the truth of the matter asserted remain admissible. *Crawford*, 541 U.S. at 59.

In this case, the trial court properly redacted the CI's testimonial statements made for the purpose of manufacturing evidence against Shaw. It ruled that the remaining statements were in furtherance of the transaction and not offered to prove the truth of the matter asserted. By ordering the redaction, the trial court eliminated potential *Crawford* violations. 541 U.S. at 52-53. Shaw does not establish a violation of his confrontation rights.

#### Ineffective Assistance

Shaw next contends his counsel rendered ineffective assistance when he failed to object adequately to the lack of foundation for the recording. He argues that trial counsel improperly failed to articulate the proper grounds for his foundation objection and that he should have objected to the CI's statements in the recording.

A claim of ineffective assistance of counsel requires a showing of deficient performance by counsel resulting in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Shaw acknowledges that he must overcome a strong presumption his counsel's performance was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

As discussed above, the State presented adequate foundation and the trial court did not allow any testimonial statements by the CI. Counsel did not provide deficient performance and, thus, we do not address the prejudice prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Shaw's ineffective assistance of counsel argument fails.

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Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, J.

We concur:

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Van Deren, C.J.

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Penoyar, J.